Supreme Court, U.S.
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No. _____

In The
Supreme Court of the United States

BEHYAR BEHDANI; HOMA BEHDANI; BABAK BEHDANI; AMIRREZA BEHDANI,

Petitioners,

v.

U.S. IMMIGRATION & NATURALIZATION SERVICE,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

Petition for Writ of Certiorari

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QUESTIONS PRESENTED FOR REVIEW

A. Whether this Court Must Articulate a Uniform Standard of the Burden of Proof Required in Asylum Cases

B. Whether The Court Below Failed to Address the Important Constitutional Issue of Ineffective Assistance of Counsel in its Decision

C. Whether the Steps Outlined in Matter of Lozada are Required to Allege Ineffective Assistance of Counsel in an Immigration Case

LIST OF PARENT COMPANIES

None of the Petitioners' listed on the cover for this appeal are a corporation or subsidiary of a corporation.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED FOR REVIEW i

LIST OF PARENT COMPANIES ii

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES v

OPINIONS AND ORDERS BELOW 1

BASIS FOR JURISDICTION 1

STATUTORY PROVISIONS INVOLVED 2

STATEMENT OF THE CASE 3

REASONS FOR GRANTING THE WRIT 6

A. This Court Must Articulate a Uniform Standard of the Burden of Proof Required in Asylum Cases 6

B. The Court Below Failed to Address the Important Constitutional Issue of Ineffective Assistance of Counsel in its Decision 12

C. There is a Conflict Between the BIA and a Federal Court Regarding the Steps Required to Allege Ineffective Assistance of Counsel in an Immigration Case..... 14

CONCLUSION..... 17

APPENDIX..... App. i

TABLE OF AUTHORITIES

CASES

Abankwah v. INS,
185 F.3d 18, 1999 WL 476436 (2d Cir. 1999) 8-9

Abel v. United States,
362 U.S. 217, 4 L. Ed. 2d 668,
80 S. Ct. 683 (1960) 12

Anin v. Reno,
188 F.3d 1273 (11th Cir. 1999) 16

Artiga-Turcios v. INS,
829 F.2d 720, 723 (9th Cir. 1987) 9

Bolanos-Hernandez v. INS,
767 F.2d 1277, 1285 (9th Cir. 1984) 9

Canjura-Flores v. INS,
784 F.2d 885 (9th Cir. 1985) 10

Cardoza-Fonseca v. INS,
767 F.2d 1448, 1453 (9th Cir. 1985), aff'd,
480 U.S. 421, 107 S.Ct. 1207,
94 L.Ed2d 434 (1987) 8

Figeroa v. INS,
886 F.2d 76 (4th Cir. 1989) 15

INS v. Lopez-Mendoza,
468 U.S. 1032, 1038, 82 L. Ed. 2d 778,
104 S. Ct. 3479 (1984) 12

Lopez v. INS,
775 F.2d 1015, 1017 (9th Cir. 1985) 12

Lopez v. INS,
184 F.3d 1097, 1100 (9th Cir. 1999) 16

Magallanes-Damian v. INS,
783 F.2d 931, 933 (9th Cir. 1986) 12

Matter of B-B-,
Int. Dec. 3367 (BIA 1998) 1, 7, 11

Matter of Dass,
20 I&N Dec. 120 (BIA 1989) 7, 8

Matter of Lozada,
19 I&N Dec. 637 (BIA 1988), aff'd
Lozada v. INS,
857 F.2d 10 (1st Cir. 1988) 14, 15, 16

Matter of M-D-,
Int. Dec. 3339 (BIA 1998) 9, 11

Matter of Mogharrabi,
19 I&N Dec. 439 (BIA 1987) 8

Matter of S-M-J-,
Int. Dec. 3303 (BIA 1997) ..... passim

Matter of Y-B-,
Int. Dec. 3337 (BIA 1998) 9, 11

Mejia Rodriguez v. Reno,
178 F.3d 1139 (11th Cir. 1999) 13, 14

Naranjo-Castillo v. INS,
145 F.3d 1346 (10th Cir. 1998) 16

Ramirez-Durazo v. INS,
794 F.2d 491, 499-500 (9th Cir. 1986) 12

United States v. Campos-Asencio,
822 F.2d 506, 509 (5th Cir. 1987) 12

STATUTES

8 U.S.C. Sec. 1252(a) 1

8 U.S.C. Sec. 1158(b) 2, 6

8 U.S.C. Sec. 1101(a)(42)(A) 2

8 C.F.R. Sec. 208.13(a) 3, 7

28 U.S.C. Sec. 1254(1) 1

OPINIONS AND ORDERS BELOW

The September 20, 1999 opinion of the United States Court of Appeals for the Eleventh Circuit, Pet. App. 1,[1] is unreported. The December 20, 1999 opinion of the United States Court of Appeals for the Eleventh Circuit, denying a petition for rehearing, is also unreported.

The Board of Immigration Appeals ("BIA") issued a published decision in this case on September 24, 1998, Matter of B-B-, Int. Dec. 3367 (BIA 1998). Pet. App, 3-7.

BASIS FOR JURISDICTION IN THIS COURT

The Board of Immigration Appeals, Executive Office for Immigration Review, of the Department of Justice, dismissed the Petitioner's appeal of an earlier immigration judge's decision on September 24, 1998. Pursuant to 8 U.S.C. section 1252(a), Immigration and Nationality Act Section 242(a), the Petitioner filed a Petition for Review in the United States Court of Appeals for the Eleventh Circuit.

Following oral argument in Atlanta, the Court of Appeals dismissed the petition for review on September 20, 1999. The petitioner subsequently filed a petition for rehearing with the Court of Appeals. The Court denied the petition for rehearing on December 20, 1999. This Court has jurisdiction to review the Eleventh Circuit's decision pursuant to 28 U.S.C. Sec. 1254(1).

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[1]"Pet. App." references are to the Appendices to the Petition.

STATUTORY PROVISIONS INVOLVED

8 U.S.C. section 1158(b), Immigration and Nationality Act ("INA") Sec. 208(b):

(b) Conditions for Granting Asylum.

(1) In general. The Attorney General may grant asylum to an alien who has applied for asylum in accordance with the requirements and procedures established by the Attorney General under this section if the Attorney General determines that such alien is a refugee within the meaning of section 101(a)(42)(A).

8 U.S.C. Sec. 1101(a)(42)(A), INA Sec. 101(a)(42(A):

(42) The term "refugee" means:

(A) any person who is outside any country of such person's nationality or, in the case of a person having no nationality, is outside any country in which such person last habitually resided, and who is unable or unwilling to return to, and is unable or unwilling to avail himself or herself of the protection of, that country because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a

particular social group, or political opinion. . .

8 C.F.R. Sec. 208.13(a):

Burden of proof. The burden of proof is on the applicant for asylum to establish that he or she is a refugee as defined in section 101(a)(42) of the Act. The testimony of the applicant, if credible, may be sufficient to sustain the burden of proof without corroboration."

STATEMENT OF THE CASE

The Facts

Behyar Behdani, his wife, Homa, and their three children are citizens of Iran. In Iran, Behdani served as an employee of the Islamic Republic News Agency, the state news agency of Iran. R. 97. He was stationed with the IRNA's bureau in New Delhi, India, from 1985 until 1989. Behdani's position was that of Bureau Chief in New Delhi.

During his tenure with the IRNA in India, Behdani's wife and children visited the United States to obtain medical treatment for Babak. Record at 97 (hereinafter "R.", citing to the Administrative Record.). After his wife and children had traveled to the U.S., Behdani was approached clandestinely by a U.S. official affiliated with the U.S. Embassy in New Delhi. Behdani knew this man as "David" or "Mr. David." Through "David," Behdani was warned that he would be recalled from India by the Iranian government because his family had traveled to the U.S., and that if he needed any help, to contact David at the U.S. Embassy. R. 35-40.

Behdani was in fact recalled to Iran several days after his meeting with the U.S. Embassy official. He was summoned to the "Gozinesh" - the state security agency - for interrogations by the secret police. Iranian agents questioned

Behdani about his family's visit to the United States, and also about his activities while stationed in India. His interrogators even knew the identity of the mysterious "Mr. David" from the U.S. Embassy in Delhi. When questioned about David, Behdani denied any knowledge of him. Behdani was finally permitted to return to India, with the warning that if his family failed to return from the U.S., there would be trouble. Id.

In 1989, Behdani finished his overseas post with the IRNA in India. He was recalled to Iran and assigned to work for the President's office. His family, who had returned to India from their earlier visit to the U.S., again traveled to the U.S. in February 1990. Once he returned to Iran, Behdani asked his supervisor at the IRNA for permission to visit the United States, where his son, Babak, was again receiving medical treatment. His supervisor forbade him from traveling to the U.S. Defying this order, Behdani then traveled to the United Arab Emirates, where he applied for and received a visitor's visa to the United States. He joined his family in the United States on July 5, 1990. R. 216.

After arriving in the United States, Behdani retained the services of attorney Cynthia Aziz, who has a practice in Charlotte, North Carolina. Attorney Aziz represented the Behdanis in various immigration matters between December 1990 and June 1997. R. 41-43.

Attorney Aziz's representation of the Behdanis encompassed several different areas. First, she evaluated Behdani's potential political asylum claim. Second, she obtained periods of extended voluntary departure (EVD) from the Atlanta, GA, District Office of the Immigration and Naturalization Service. R. 41. Finally, she represented the Behdani family at their deportation hearing, held on October 1, 1996.

In evaluating Behdani's asylum claim, Aziz attempted to locate Mr. David through the Department of State in Washington. R. 41. She was unable to locate any such individual. She then reported to Behdani that, absent

"objective corroborating evidence" it would be "difficult" for him to prevail in an asylum claim. R. 42. In a letter to Behdani, dated May 16, 1991, Attorney Aziz instructed him, that unless he obtained evidence of "David" from the U.S. Embassy and/or another witness who could corroborate his claim, he could not apply for asylum. R. 44.

Mr. Behdani relied upon his attorney's advice and did not apply for asylum, as he was unable to obtain the additional evidence or an additional witness. He instead retained Aziz to secure extended voluntary departure for him and his family.

After Behdani and his family were placed in deportation proceedings in 1996, he again discussed his fear of returning to Iran with Attorney Aziz She refused to file an asylum application for Behdani, stating that "the reasons he had relayed to me six years ago. . . would not be an adequate basis to win asylum without objective evidence." R. 42.

The Decisions Below

Behdani and his family were placed in deportation proceedings on July 17, 1996. R. 218. At a deportation hearing on October 1, 1996, the Immigration Judge found them subject to deportation from the United States for overstaying their visitor's visas. The Judge granted the Behdanis voluntary departure until June 15, 1996. R. 170-173. The Behdani family was not present at this hearing, which was conducted telephonically from their lawyer's office.

On or about June 18, 1997, through present counsel, Paul Shearman Allen & Associates, Behdani filed a Motion to Reopen his case with the Immigration Court in Atlanta. R. 79. The purpose of this motion was to allow him an opportunity to file for political asylum. Id. Behdani stated, in his motion, that he had failed to file previously for asylum

due to ineffective assistance of counsel. The Immigration Court denied the Motion to Reopen on July 2, 1997. R. 74.

On July 31, 1997, Behdani filed an appeal of the Immigration Court's denial of his Motion to Reopen with the Board of Immigration Appeals ("BIA" or "Board"). R. 59. In his appeal, Behdani sought both a reversal of the Immigration Court's decision as well as a remand of the matter for a consideration of his political asylum application, which had been submitted by present counsel along with the Motion to Reopen. R. 94-101.

The Board of Immigration Appeals, September 24, 1998, denied Behdani's appeal of the Immigration Judge's denial of his motion to reopen. The Board concluded that, while their prior attorney "discouraged" them from applying for asylum, her conduct was not so egregious that it rendered their hearing unfair.

On September 20, 1999 the United States Court of Appeals for the Eleventh Circuit affirmed the decision of the BIA. The Court of Appeals affirmed the decision of the BIA without any written explanation. On December 20, 1999, the Court of Appeals dismissed Behdani's petition for rehearing.

REASONS FOR GRANTING THE WRIT

A. This Court Must Articulate a Uniform Standard of the Burden of Proof Required in Asylum Cases

This case involves the legal standards for proving an asylum claim, pursuant to 8 U.S.C. section 1158(b), Immigration and Nationality Act Sec. 208(b). These standards have been misinterpreted in the proceedings below. Both the BIA, in a published decision, and the Court of Appeals, by affirming the BIA decision, have misinterpreted the legal standard of proof and evidence required in a political asylum case. Because the result in Behdani's case is contrary to the holdings of federal courts,

as well as the BIA's own precedent, the Supreme Court must intervene and articulate clear standards.

In the instant case, Behdani's former attorney insisted on additional corroborating evidence in order to pursue a political asylum case. While it is correct that corroborating evidence is not optional, the detailed evidence which Behdani's former counsel demanded was not required under the circumstances. The BIA's decision in Matter of B-B- found that former counsel's insistence on specific corroborating evidence was "reasonable in light of case precedent." However, such a conclusion actually is in conflict with case precedent and with the regulation at 8 C.F.R. 208.13(a).

The BIA has discussed both the asylum applicant's burden of proof, as well as the general relevancy and importance of corroborating evidence, including, but not limited to, general background information, as well as evidence more specific to the individual's claim. See Matter of S-M-J-, Int. Dec. 3303 (BIA 1997).

"Because the burden of proof is on the alien, an applicant should provide supporting evidence, both of general country conditions and of the specific facts sought to be relied on by the applicant, where such evidence is available. Matter of Dass, supra, at 124. If such evidence is unavailable, the applicant must explain its unavailability . . . Moreover, general country condition information may be necessary to support an applicant's testimony where the alien's claim is based on allegations which may be independently verified." Matter of S-M-J-.

Thus, even according to the BIA, supporting evidence must be provided when it is available. Nevertheless, the BIA also recognizes that, in certain circumstances, it may be very difficult, if not impossible, for asylum applicants to provide certain evidence. "Where the record contains general country condition information, and an applicant's claim relies primarily on personal experiences not reasonably subject to verification, corroborating

documentary evidence of the asylum applicant's particular experience is not required. Unreasonable demands are not placed on an asylum applicant to present evidence to corroborate particular experiences." Id.

According to Matter of Mogharrabi, 19 I&N Dec. 439 (BIA 1987), an asylum application will not be denied solely due to a lack of corroborating evidence, although such evidence should be presented, if available. Indeed, the BIA has long recognized the difficulties which many aliens face in obtaining documentary evidence to corroborate their claims of persecution. See Matter of Dass, 20 I&N Dec. 120 (BIA 1989); Matter of Mogharrabi, supra. In the instant case, it was egregious for petitioner's former counsel to demand that he provide corroborating evidence of his contacts with a former U.S. Embassy official in New Delhi. Despite the efforts of counsel herself, such evidence was clearly unavailable. Counsel should have filed the asylum application, and, if Behdani had later been questioned about the identity or whereabouts of Mr. David, he could offer a reasonable explanation as to why this information was unavailable. First, he suspected that Mr. David was perhaps a CIA agent. If this were the case, then it would be reasonable to assume it would be difficult to locate him. In addition, Behdani's attorney nonetheless attempted to locate this potential witness, and failed. While this evidence was unavailable, it certainly did not prohibit the filing of Behdani's asylum claim. Indeed, it is exactly the sort of evidence which the Board, in Matter of S-M-J-, realizes would be unavailable, as it relates to the applicant's "personal experiences not reasonably subject to verification."

The Supreme Court has long recognized that the credible and specific testimony of an asylum applicant, standing alone, may form the basis for a successful claim. Cardoza-Fonseca v. INS, 767 F.2d 1448, 1453 (9th Cir. 1985), aff'd, 480 U.S. 421, 107 S.Ct. 1207, 94 L.Ed2d 434 (1987). Recent federal court decisions elaborate on this rule. In Abankwah v. INS, 185 F.3d 18, 1999 WL 476436

(2d Cir. 1999), the Court of Appeals examined an asylum case which had been denied by the BIA on the grounds of insufficiency of evidence. The Court recognized that an asylum applicant must prove that her fear is both subjective and objectively reasonable, or well-founded. The Court reversed the BIA decision, finding that "the BIA was too exacting both in the quantity and quality of evidence that it required." Id. The Court further noted, "Without discounting the importance of objective proof in asylum cases, it must be acknowledged that a genuine refugee does not flee her native country armed with affidavits, expert witnesses, and extensive documentation." Id.

Other courts have previously recognized the same principle, finding that "an alien seeking asylum is often limited in the evidence he can obtain to show proof of political persecution." Artiga-Turcios v. INS, 829 F.2d 720, 723 (9th Cir. 1987). "Persecutors are hardly likely to provide their victims with affidavits attesting to their acts of persecution." Bolanos-Hernandez v. INS, 767 F.2d 1277, 1285 (9th Cir. 1984).

Behdani cannot be compared with the aliens in the cases cited by the BIA in its decision. He is unlike the aliens in Matter of Y-B-, Int. Dec. 3337 (BIA 1998) and Matter of M-D-, Int. Dec. 3339 (BIA 1998). In both these cases, the decision of the BIA rested, inter alia, on credibility grounds and on some seemingly implausible elements of the claims. In the latter case, the immigration judge specifically granted the applicant a continuance so that he could provide documentation of his stay in a refugee camp, and he failed to do so. Neither Behdani's former counsel nor the BIA doubted his credibility. Moreover, Behdani presented to his former counsel documents proving that he was employed by the Iranian government. These documents are the type of individually specific evidence envisioned by the BIA in Matter of S-M-J-.

The statement which Behdani presented to his former counsel in 1990 was both credible and logical. Behdani's former counsel found his statement to be credible, and neither the BIA nor the IJ disputed his credibility when adjudicating his motion to reopen. When the BIA and the IJ are silent on the issue of an alien's credibility, the reviewing court will presume credibility. Canjura-Flores v. INS, 784 F.2d 885 (9th Cir. 1985). Because there can be no dispute, at this point in time, as to the credibility of Behdani's statements in support of his asylum claim, his former attorney's advice (that additional corroborating evidence was required) must be viewed as a misstatement of the law.

While Behdani did not provide his previous counsel with general background information regarding country conditions in Iran, it is not necessarily his duty to do so. Attorney Aziz could easily have supplemented Behdani's written statement and testimony regarding his fear of harm in Iran with reports from the U.S. Department of State, Amnesty International, and other human rights organizations. Yet Aziz did not attempt to do this, and instead attempted to obtain direct and specific corroboration of Behdani's claims from the U.S. Department of State and even from Iranian sources. While these attempts were admirable, it was not necessary to acquire such evidence before applying for asylum, and the law simply does not require this type of evidence.

Moreover, according to the BIA, the Immigration Judge and the INS have a duty to provide evidence of country conditions, in the form of background information, at immigration hearings. See Matter of S-M-J-. Thus, even though Behdani had not provided evidence of country conditions to his attorney, this would not prevent the filing of his asylum claim.

The evidence which Behdani's former counsel attempted to secure, while it would have certainly bolstered his asylum claim, is the type of evidence which most likely does not even exist. Former counsel attempted to seek

corroboration from the U.S. Department of State regarding one of its officials present in India during Mr. Behdani's tenure there with the Islamic Republic News Agency. Based on his dealings with this individual, Behdani believed him to be an agent of the CIA stationed at the U.S. Embassy in India. If this was correct, it seems difficult to imagine that the U.S. government would confirm his presence in India, or that would have given Attorney Aziz any information to try to contact him.

The recent cases cited by the BIA in affirming the propriety of Aziz's actions were not even the law at the time that Aziz rendered the relevant advice to Behdani. See Matter of S-M-J-, Int. Dec. 3303 (BIA 1997); Matter of M-D-, Int. Dec. 3339 (BIA 1998); Matter of Y-B-, Int. Dec. 3337 (BIA 1998). These cases were decided in 1997 and 1998, while Behdani's former counsel evaluated his political asylum claim in 1990-91 and again in 1996, when he was placed in deportation proceedings. These cases illustrate a recent trend of the BIA to seek a greater degree of corroborating evidence from asylum applicants.

Even under these newer BIA cases, Behdani's former counsel could have, and should have, presented his asylum claim. It is illogical for the BIA to hold, in one case, that an asylum applicant need not provide specific corroborating evidence, if it is unavailable, yet in Matter of B-B-, find that the attorney's insistence on additional corroborating evidence was "reasonable." Because of the confusing and seemingly contradictory opinion of the BIA, which was adopted by the Court of Appeals, the Supreme Court should provide guidance and elucidate a uniform federal standard.

B. The Court Below Failed to Address the Important Constitutional Issue of Ineffective Assistance of Counsel in its Decision

Because deportation proceedings are deemed to be civil, rather than criminal, in nature, the Behdanis have no constitutional right to counsel under the Sixth Amendment. United States v. Campos-Asencio, 822 F.2d 506, 509 (5th Cir. 1987); Magallanes-Damian v. INS, 783 F.2d 931, 933 (9th Cir. 1986). See also INS v. Lopez-Mendoza, 468 U.S. 1032, 1038, 82 L. Ed. 2d 778, 104 S. Ct. 3479 (1984) ("A deportation proceeding is a purely civil action to determine eligibility to remain in this country. . . . Consistent with the civil nature of the proceeding, various protections that apply in the context of a criminal trial do not apply in a deportation hearing."); Abel v. United States, 362 U.S. 217, 237, 4 L. Ed. 2d 668, 80 S. Ct. 683 (1960) ("deportation proceedings are not subject to the constitutional safeguards for criminal prosecutions"). Nevertheless, such petitioners are entitled to due process under the Fifth Amendment to the U.S. Constitution. "Ineffective assistance of counsel in a deportation proceeding is a denial of due process only 'if the proceeding was so fundamentally unfair that the alien was prevented from reasonably presenting his case.'" Ramirez-Durazo v. INS, 794 F.2d 491, 499-500 (9th Cir. 1986) (quoting Lopez v. INS, 775 F.2d 1015, 1017 (9th Cir. 1985)).

In Behdani's petition before the Court of Appeals, he raised the constitutional issue of ineffective assistance, yet the Court did not address the issue in its decision, instead, choosing to affirm the decision of the BIA without explanation. In addition to the ineffective assistance issue, Behdani also raised on appeal the issue of whether he was received due process when his sole "appearance" before an Immigration Judge was a ten-minute, telephonic hearing, at which he was not even present, only his attorney was. The

brief nature of the hearing was not addressed by the BIA in its decision either.

Neither the BIA nor the Court of Appeals reached the issue of whether Behdani suffered prejudice, as neither made a finding of ineffective assistance. However, Behdani did present a prima facie case for political asylum in his motion to reopen, and thus, his former counsel's incorrect advice is extremely prejudicial. Behdani was detained and interrogated by the police in Iran on numerous occasions in 1987. At that time, his wife and children were in the United States, and he was warned that they must return. It is not unreasonable to imagine that, over ten years later, the Iranian government might be angry to learn that, not only had Behdani's family never returned to Iran, but he himself had joined them in the United States. If Behdani were to return to Iran, it is not unreasonable to believe that he would be again detained and interrogated by the police.

When the evidence in the record is reviewed in toto, it is clear that Behdani's fear of harm upon return to Iran meets the "well-founded fear" standard outlined by the Supreme Court and explained by the BIA's decisions. Despite the number of years which have passed since Behdani's flight from Iran, it is not unreasonable that he still fears to return there. Indeed, it is because of his position as a former IRNA employee that he is at an even greater risk.

While the Court of Appeals did not mention it in its decision, it may have in part relied upon its decision in Mejia Rodriguez v. Reno, 178 F.3d 1139 (11th Cir. 1999). In that case, which involved a complaint that counsel's conduct prevented the petitioner from filing for a discretionary suspension of deportation, the Court of Appeals found that no constitutional rights were violated. The Court held that "the failure to receive relief that is purely discretionary in nature does not amount to a deprivation of a liberty interest." The Court further recognized that an attorney's misconduct "does not deprive an alien of due process if the

deficient representation merely prevents the alien from being eligible for suspension of deportation." Id.

The instant case must not be compared to Mejia Rodriguez, which involved a criminal alien who sought to apply for suspension of deportation. Since Behdani seeks to apply for political asylum, there is a chance that an attorney's misconduct or deficient advice would deprive him of due process.

The Supreme Court should consider this case, as Behdani's constitutional arguments have not been addressed by the Court of Appeals.

C. There is a Conflict Between the BIA and a Federal Court Regarding the Steps Required to Allege Ineffective Assistance of Counsel in an Immigration Case.

According to the Board of Immigration Appeals, there are certain very distinct steps which an alien must take before bringing an ineffective assistance of counsel claim in an immigration case. These steps were set out first in Matter of Lozada, 19 I&N Dec. 637 (BIA 1988), aff'd Lozada v. INS, 857 F.2d 10 (1st Cir. 1988).

In the Lozada case at the BIA, the Board found that a respondent who sought to reopen a deportation case based on ineffective assistance of counsel must, in his motion to reopen:

(1) Submit an affidavit setting forth in detail the agreement that was entered into with counsel with respect to the actions to be taken and what representations counsel did or did not make to the respondent;

(2) Inform his former counsel of the allegations of ineffective assistance against him and give him an opportunity to respond;

(3) Explain whether a complaint against former counsel has been filed with the appropriate disciplinary authorities, and if not, explain why not.

In the Lozada case, the BIA reasoned that these three steps were necessary to deter meritless claims of ineffective assistance against attorneys practicing in the immigration field. The Board upheld the denial of Lozada's motion to reopen, finding that no such affidavit or disciplinary complaint had been filed, nor was there any evidence that the former counsel had been notified of the allegations against him. The Lozada requirements were upheld by the U.S. Court of Appeals for the First Circuit, upon review of the BIA decision.

The First Circuit's decision, adopting the BIA's requirements in Matter of Lozada, contrasts with the Fourth Circuit's decision in Figeroa v. INS, 886 F.2d 76 (4th Cir. 1989). In Figeroa, the petitioner complained that his former counsel failed to file an asylum application, when he had instructed him to do so. The BIA in that case found that Figeroa had not alleged a proper claim, since he did not provide any evidence that he had notified former counsel of his ineffective assistance accusation, nor had he provided evidence that he had taken disciplinary action against his former attorney. Id.

The Fourth Circuit rejected the rationale of the Board, finding that Figeroa had shown that his former counsel had rendered him ineffective assistance. Even though Figeroa had not heeded the Lozada steps, the Court found that the lack of corroboration (in the form of an affidavit or a disciplinary complaint) was not a sufficient

reason to reject his ineffective assistance claim. The Court reasoned that Figeroa's story was not "inherently incredible," and also that there was no evidence that, had his former counsel been contacted, that he would have responded, or that his response would have been more credible that Figeroa's story. Id.

Finding that "attorney negligence or incompetence appears to be the only plausible explanation for Figeroa's failure to timely file an asylum application," the Court found that the representation had been deficient. Despite the finding of ineffective assistance, the Court found that Figeroa did not suffer any prejudice from his attorney's misconduct, as he did not present a prima facie claim that he would qualify for asylum.

Most other circuits do not follow the Fourth Circuit, but instead adhere to the strict Lozada requirements outlined by the BIA. See Lopez v. INS, 184 F.3d 1097, 1100 (9th Cir. 1999); Naranjo-Castillo v. INS, 145 F.3d 1346 (10th Cir. 1998); Anin v. Reno, 188 F.3d 1273 (11th Cir. 1999).

The BIA, in the instant case, did not rely upon the Lozada requirements to dismiss the motion to reopen, noting that the respondents submitted additional documentation "in an effort to comply with the Lozada requirements." The Board did not find ineffective assistance of counsel because it found the advice of former counsel to be reasonable. However, the Immigration Judge denied the Behdanis' motion to reopen because it did not comply with Lozada.

Because of the different treatment of the Lozada requirements by the various circuits, the Supreme Court should examine the requirements as set out by the BIA, and determine whether they are necessary in all cases.

CONCLUSION

For all the reasons discussed herewith, the petition should be granted.

Respectfully submitted,

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TABLE OF CONTENTS
Petition for Rehearing Appendix

Opinion,
U.S. Court of Appeals for the
Eleventh Circuit
entered September 20, 1999 1

Decision of
Board of Immigration Appeals
entered September 24, 1998 3

Opinion,
U.S. Court of Appeals for the
Eleventh Circuit
Re: Denying Petition for Rehearing
entered December 20, 1999 8

IN THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

NO. 98-9350-AA

BEHYAR BEHDANI; ROMA BEHDANI, et al.,

Petitioners,

v.

ATTORNEY GENERAL IF THE UNITED STATES, IMMIGRATION AND NATURALIZATION SERVICE

Respondents.

ENTERED SEPTEMBER 20, 1999

PETITION FOR REVIEW OF AN ORDER OF THE IMMIGRATION AND NATURALIZATION SERVICE

BEFORE: CARNES and BARKETT, Circuit Judges, and PAINE*, Senior District Judge

PER CURIAM:

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* Honorable James C. Paine, Senior District Judge for the Southern District of Florida, sitting by designation.

AFFIRMED. See 11th Cir. R. 36-1[1]

ENTERED FOR THE COURT:

/s/_____
UNITED STATES CIRCUIT JUDGE

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[1] 11th Cir. R. 36-1 provides:

When the court determines that any of the following circumstances exist:

(a) judgment of the district court is based on findings of fact that are not clearly erroneous;
(b) the evidence in support of a jury verdict is sufficient;
(c) the order of an administrative agency is supported by substantial evidence on the record as a whole;
(d) summary judgment, directed verdict, or judgment on the pleadings is supported by the record;
(e) judgment has been entered without a reversible error If law; and an opinion would have no precedential value, the judgment or order may be affirmed or enforced without opinion.

Interim Decision #3367

In re B-B- et al., Respondents

Decided September 24, 1998
Entered September 24, 1998

U.S. Department of Justice
Executive Office for Immigration Review
Board of Immigration Appeals

Where counsel's insistence on corroborating evidence discouraged the respondents from seeking asylum, but was reasonable in light of case precedent, there is no showing of ineffective counsel.

Paul Sherman Allen, Esquire, Washington, D.C., for the respondents

J. Dan Pelletier, Sr., General Attorney, for the Immigration and Naturalization Service

Before: Board Panel: SCHMIDT, Chairman; HURWITZ and ROSENBERG, Board Members.

ROSENBERG, Board Member:

The respondents have appealed the decision of the Immigration Judge not to reopen proceedings in which they were granted voluntary departure.[1] The appeal will be dismissed. The request for oral argument is denied.

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[1] The respondents' timely appeal was initially rejected because it was not accompanied by a notice of appearance. To avoid any jurisdictional issues, we will consider this case on certification, pursuant to 8 C.F.R § 3.1 (c) (1998).

The respondents, natives and citizens of Iran, entered the United States on nonimmigrant visitor visas on different dates in 1990. On October 1, 1996, the respondents were granted voluntary departure until June 15, 1997. On June 19, 1997, after their period of voluntary departure had expired, the respondents filed a motion to reopen with the Immigration Judge, alleging that prior counsel wrongfully dissuaded them from applying for asylum and charging her with ineffective assistance of counsel.

On July 2, 1997, the Immigration Judge denied the respondents' motion to reopen, observing that they had not complied with the requirements for a claim of ineffective assistance of counsel, as set forth in our decision Matter of Lozada, 19 I&N Dec. 637 (BIA 1988), aff'd, 857 F. 2d 10 (1st Cir. 1988). The Immigration Judge also commented that motions to reopen that serve dilatory purposes are disfavored and noted that the respondents were granted a generous period of voluntary departure for the express purpose of allowing a minor respondent to finish school.

On appeal, the respondents have submitted additional documentation in an effort to comply with the Lozada requirements and maintain that they have been the victims of ineffective assistance of counsel. The respondents allege that former counsel wrongly advised them that corroborating evidence would be necessary for their asylum claim and thus precluded them from applying for that relief. The respondents also argue that their efforts to satisfy the requirements of Lozada, while not precisely in accordance with that decision, are sufficiently proximate to make their claim.

In reply, the Immigration and Naturalization Service endorses the decision of the Immigration Judge. Noting that both the respondents' motion to reopen and their Notice of

Appeal were untimely,[2] the Service contends that the record reflects prior counsel's best judgment and not a refusal to file an asylum application.

As a general matter, we are reticent to revisit the respondents' choice of relief. First, there are strong policy reasons for strictly adhering to and enforcing voluntary departure orders, not the least of which is to discourage dilatory behavior. See Matter of Shaar, Interim Decision 3290 (BIA 1996), aff'd, 141 F. 3d 953 (9th Cir. 1998). The timing of the respondents' motion to reopen and their failure to take any remedial action during their 8 ½ months of voluntary departure period invites speculation into the motive behind the filing of their motion. Second, subsequent dissatisfaction with a strategic decision of counsel is not grounds to reopen. See Magallanes-Damian v. INS, 783 F. 2d 931 (9th Cir. 1986) (finding that the decision to forego contesting deportability in favor of a generous grant of voluntary departure is a tactical choice); cf. INS v. Doherty, 502 U.S. 314 (1992) (stating that withdrawal of an asylum claim to secure a tactical advantage in the first hearing did not constitute a reasonable explanation for failing to pursue a claim at that hearing). The respondents opted for a particular strategy and form of relief, and although they might wish to fault their former attorney and recant that decision, they are nonetheless bound by it, unless they can show egregious conduct on counsel's part. See Matter of Lozada, supra; see also LeBlanc v. INS, 715 F. 2d 685 (1st Cir. 1983).

Through their claim of ineffective assistance of counsel, the respondents seek to characterize the advice of their former counsel as egregious conduct. They argue that

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[2] At the motion level, the Service argued that the respondents were time barred from filing their motion to reopen. See 8 C.F.R. §§ 3.2 (c) (2), 3.23 (b) (4) (i) (1997). The Immigration Judge did not address this objection in his ruling on the motion. As we find the respondents have not made a persuasive claim of ineffective assistance of counsel, we do not reach this jurisdictional issue.

"but for" her insistence on corroborating evidence, they would have pursued their asylum claim. Upon review of the record and respondents' contentions on appeal, we are not persuaded by this argument.

To prevail, the respondents must show that the conduct of former counsel was so egregious that it rendered their hearing unfair.

See Matter of Lozada, supra. However, we observe no misconduct malfeasance, or incompetence on counsel's part. Cf. Matter of Grijalva, Interim Decision 3284 (BIA 1996). To the contrary, the record reflects that counsel was professional in her handling of the respondents' case and counseled them accordingly. We observe that counsel secured certain benefits for the respondents, including generous periods of voluntary departure from both the Service and the Immigration Court. She also explored other immigration options, including employment-based nonimmigrant visas, family-based immigrant visas, and at least initially-political asylum. On its face, the conduct of former counsel is not that which we envisioned in our decision in Lozada.

The respondents maintain that it was egregious conduct for counsel to insist on corroborating evidence before prosecuting their asylum claim. We find, however, that counsel's evaluation of their asylum claim and her insistence on corroborating evidence was entirely reasonable. We are cognizant that, in some instances, an asylum seeker need not have corroborating evidence to prevail. See Matter of Mogharrabi, 19 I&N Dec. 439 (BIA 1987). Nonetheless, the provision of corroborating evidence is not optional, and the respondents must satisfy their affirmative duty to corroborate their claim to the degree that they can, or otherwise reasonably explain their failure to do so. See Matter of S-M-J-, Interim Decision 3303 (BIA 1997); Matter of Daas, 20 I&N Dec. 120 (BIA 1989); see also Matter of M-D-, Interim Decision 3339 (BIA 1998); Matter of Y-B-, Interim Decision 3337 (BIA 1998). We find nothing

egregious in counsel advising respondents to comply with express legal precedent, particularly when counsel must balance her clients' desire for relief with her duty to both the court and her clients' interests not to file a frivolous application for relief. See 8 C.F.R. § 292.3 (a) (15) (i) (1988); see also section 208 (d) (6) of the Immigration and Nationality Act, 8 U.S.C. § 1158 (d) (6) (Supp. II 1996).

In summary, we find that the respondents have not made a prima facie showing of ineffective assistance of counsel. As the record does not establish that former counsel engaged in egregious conduct, we decline to reopen the proceedings. See Matter of Lozada, supra; see also Mohsseni Behbahani v. INS, 796 F. 2d 249 (9th Cir. (1986). See generally Matter of Santos, 19 I&N Dec. 105 (BIA 1984).

ORDER: This appeal is dismissed

/s/ L. Rosenberg
FOR THE BOARD

IN THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

NO. 98-9350-AA

BEHYAR BEHDANI; ROMA BEHDANI, et al.,

PETITIONERS,

v.

ATTORNEY GENERAL IF THE UNITED STATES, IMMIGRATION AND NATURALIZATION SERVICE

RESPONDENTS.

ENTERED DECEMBER 20, 1999

PETITION FOR REVIEW OF AN ORDER OF THE IMMIGRATION AND NATURALIZATION SERVICE

BEFORE: CARNES and BARKETT, Circuit Judges, and PAINE*, Senior District Judge

PER CURIAM:

The Petition(s) for Rehearing filed by petitioners is DENIED.

ENTERED FOR THE COURT:

/s/ UNITED STATES CIRCUIT JUDGE

* Honorable James C. Paine, Senior District Judge for the Southern District of Florida, sitting by designation.